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Supreme Court of the United States

October Term, 1950.

No. 440

SAMUEL DUNKEL & CO., INC., SONDRA EGG PRODUCTS CORP., CHARLES COHEN, JULIUS COHEN, CARL EBBIGHAUSEN and SIDNEY ATLAS,

Petitioners,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Second Circuit.

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OCTOBER TERM, 1950.

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AGAINST

UNITED STATES OF AMERICA,
Respondent.

No. .....

Petition for Writ of Certiorari to the Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully show:

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on October 31, 1950. On November 10, 1950, Mr. Justice Jackson granted an extension of time within which to file this petition to and including December 30, 1950. Jurisdiction of this Court is invoked under Title 28, Section 1254 (1).

Opinions Below.

The District Court delivered no opinion. The opinion of the Court of Appeals (App. 409) is not yet reported.

Questions Presented.

1. Whether it is prejudicial for the United States to charge and have defendants sentenced on two indictments for separate conspiracies when its position at the trial is that only one conspiracy existed and when substantial amounts of the evidence, admittedly not relevant to one of the indictments, is either used as part of the proof as to that indictment or is so introduced that the jury is unable to determine whether it may or may not be considered as to both indictments?

2. Whether the defendants may be convicted and sentenced on two indictments for separate conspiracies when, although the United States takes the position that only one conspiracy existed, the trial judge does not permit the jury to determine that only one conspiracy did exist?

3. Whether under *Braverman* v. *United States*, 317 U. S. 49, the defendants may be convicted and sentenced on two indictments for separate conspiracies when the proof, as virtually conceded by the United States, shows that only one conspiracy existed?

4. Whether the defendants may be charged, convicted and sentenced for two separate conspiracies when one of the indictments appears to allege the existence of six separate conspiracies and when the proof demonstrates the existence of only one conspiracy?

Statutes Involved.

18 U. S. C. §88, the statute under which indictment No. 29097 was laid, provided as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

18 U. S. C. §83, the statute under which indictment No. 29098 was laid, provided as follows:

> "Whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Statement.

The six petitioners were indicted, together with Jacob Ferber, in two indictments. Indictment No. 29097 charged them with conspiracy to defraud the United States of approximately $650,000 in violation of 18 U. S. C. §88.[1] The gist of the charge was that the defendants had conspired to deliver approximately 650,000 pounds of egg powder, previously rejected by the Department of Agriculture, under contracts which Samuel Dunkel & Co. had made with the Federal Surplus Commodities Corporation (App. 5-17).

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1. Now 18 U. S. C. §371.

The second indictment, No. 29098, charged the same persons with one or six conspiracies to defraud the United States by obtaining the payment of certain false claims, in violation of 18 U. S. C. §83.[2] The indictment alleged six such claims, using the statutory indicting language as to each and giving the particulars respecting each claim (App. 19-91).

The two indictments were consolidated, and upon the first trial all the petitioners, except Atlas and Ebbighausen, were found guilty as to both indictments. Atlas and Ebbighausen were acquitted on the second indictment but they were found guilty on the first indictment. On appeal the Court of Appeals for the Second Circuit reversed the convictions (App. 1-2). *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506. After the reversal the Government proceeded with a new trial, again, over the objection of the defendants, consolidating the two indictments (App. 93). All the defendants were tried on both indictments, except for Atlas and Ebbighausen who, because of their acquittal, were tried only on the indictment charging violation of 18 U. S. C. §88.

The defendants tried under both indictments were convicted under both indictments; Atlas and Ebbighausen were convicted under the Section 88 indictment. Each of the individual defendants was both sentenced and fined, and the corporate defendants were fined. The sentences were as follows: Samuel Dunkel & Co., Inc., was fined $10,000 on each indictment; Sondra Egg Products Corp., was fined $5,000 on each indictment; Charles Cohen was sentenced to two years' imprisonment under each indictment, the sentences to run concurrently; and he was fined $1,000 under the first indictment and $4,000 under the second; Julius Cohen was sentenced to two years' imprisonment under the first indictment and three years' imprisonment under the second, the sentences to run con-

2. Now 18 U. S. C. §286.

currently, and he was fined $1,000 under the first indictment and $2,000 under the second. Ebbighausen and Atlas were each sentenced to a years' imprisonment and were each fined $1,000.

On appeal, the Court of Appeals for the Second Circuit, in an opinion written by Judge Swan and concurred in by Judges Learned Hand and Clark, affirmed the convictions.

This petition for certiorari was thereupon taken.

The trial of the petitioners lasted from September 7, 1949 to October 20, 1949. Because of the length of the record, the case was presented to the Court of Appeals on a Joint Appendix. In the event that certiorari is granted, the entire transcript, or a substantially greater portion of it, will be printed.[3]

The absence of a complete printed record, however, is no barrier to a comprehension of the salient facts of the case. The evidence introduced by the United States tended to show the following:

Samuel Dunkel & Co., Inc. was in the dried egg powder business and had certain contracts with the Federal Surplus Commodities Corporation. Affiliated with this corporation was Sondra Egg Products Corporation. Charles Cohen, Julius Cohen and Carl Ebbighausen were officers or employees of both corporations. Sidney Atlas was the manager of the drying plant, operated by Sondra Egg Products Corporation (App. 409-410).

With respect to the Section 88 indictment the proof adduced by the United States was to the effect that the defendants had by various means succeeded in delivering to the Federal Surplus Commodities Corporation egg powder which had been rejected in inspection. The details of how this deception was practiced are extremely complicated but not now important. It was also shown that after the de-

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3. The typewritten transcript has been certified to this Court by the Clerk of the Court of Appeals for the Second Circuit. See Stern and Gressman, Supreme Court Practice (1950) 156.

liveries were made that the defendants submitted false vouchers and grading certificates in order to be paid.

The proof as to the Section 83 indictment included the evidence on the Section 88 indictment. In addition the Government proved that, apart from the false vouchers and certificates which had been submitted by the defendants, false affidavits had been made out as to the date of manufacture.[4] The affidavits were to the effect that the powder had been manufactured within thirty days, but it should be noted that the Section 83 indictment in each of the alleged six instances states that the affidavit was filed in connection with delivery of powder that had been rejected (App. 24-25, 27-28, 29-30, 31-32, 34-35, 36-37). It is true that the affidavits, in one instance, also related to powder which had not been rejected but had been diverted from Government stocks, but the reason that they also related to such diverted powder is that the diverted powder had been combined with the rejected powder. It was because of this fact that the Court of Appeals said the two conspiracies were different: "In part the proof overlapped but not altogether. Thus proof of a false affidavit as to the date of manufacture of egg powder which had never been rejected would be relevant under the §83 indictment but not under the §88 indictment" (App. 411).

In short, although the proof under the Section 83 indictment may have shown that in this instance, and possibly in others, the false affidavits covered non-rejected powder, in each case the false affidavits also covered rejected powder.

It is on this element in the case—that the affidavits did not in every instance cover only rejected powder—that the Government's claim of a separate conspiracy under the Section 83 indictment must rest.

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4. It is noteworthy that the Section 88 indictment refers to these affidavits (App. 10).

Reasons for Granting the Writ.

This case is an extreme illustration of certain of the abuses which have developed in prosecutions for criminal conspiracy. The law established, on the one hand, in *Braverman* v. *United States,* 317 U. S. 49, and, on the other hand, in *Kotteakos* v. *United States,* 328 U. S. 750, was disregarded. Neither the defendants nor the jury could determine whether one conspiracy, two conspiracies, or seven conspiracies was the theory of the grand jury and of the Government; and if two or seven conspiracies were charged, only one was proved. Yet certain of the petitioners were sentenced on two separate indictments.

I.

The Confusion as to Conspiracies.

Elsewhere in this petition, we shall demonstrate, although the petitioners were sentenced on the theory that two separate conspiracies had been established, that (1) the jury was never given the opportunity to determine whether in fact two or only one conspiracy had been established and (2) the proof incontrovertibly established that only one conspiracy existed.

But apart from these errors, the confusion that existed at the trial as to the theory of the United States is itself ground for reversal. Although apparently of the opinion—expressed both explicitly and in the manner of his presentation of evidence—that one conspiracy existed, the prosecutor nevertheless permitted the case to go to the jury on a two-conspiracies theory; in many instances he so equivocated that it was impossible for the defendants or for the jury to know whether evidence was or was not being presented against them on both or on only one of the indictments. Finally, evidence, clearly inadmissible on one of

the indictments, was nevertheless introduced as against four of the defendants with respect to that indictment.

Indictment No. 29097 (the §88 indictment) charged that the petitioners, together with one other person, had conspired between August 1, 1941 and November 1, 1942 to defraud the United States of approximately $650,000. Five overt acts were charged—on July 13, 1942, on July 28 and 29, 1942, and two on August 1, 1942 (App. 4-17).

Indictment No. 29098 (the §83 indictment) charged that petitioners, together with one other person, had conspired between May 1, 1942 and November 1, 1942. The United States takes the position that it charged one conspiracy between these dates. As we shall point out subsequently, the indictment is more or equally susceptible of the interpretation that six separate conspiracies were charged. But accepting *arguendo* the Government's interpretation, the indictment charged a conspiracy to obtain the payment of six different false claims. Four overt acts were charged, This indictment, together with its exhibits, runs from page 18 to page 91 of the Joint Appendix.

The two indictments named the same persons. The second indictment was wholly within the period of conspiracy charged by the first. The overt acts charged in the first indictment were all within the period of time covered by the second. The basic transactions underlying the two indictments were the same.

It is, of course, conceivable that the same persons, engaged in the same business, could make two separate agreements for the same periods of time to do different illegal acts with reference to the same transactions. That is what the United States must say occurred in this case if the indictments are to be sustained. But the greater probability is that there was a single agreement. "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." *Braverman* v. *United States,* 317 U. S. 49, 53 (1942).

It was open to the Government to justify the two indictments by proving two separate agreements. No such effort was made. Instead of proceeding in this manner, the prosecutor, in at least most of his comments, as well as in his presentation of the evidence, assumed that only a single conspiracy was charged.

> "I still think perhaps that the proof shows that the conspiracy which was charged is the same conspiracy" (App. 201).
>
> "* * * the real question involved is not whether there are two conspiracies, but whether there are two offenses involved" (App. 201).
>
> "That is one conspiracy may constitute violations of the separate statutes" (App. 202).

The theory of the prosecution that there was one conspiracy was clearly presented in the Government's summation.

> "a conspiracy, as charged" (App. 323).
> "a conspiracy actually existed such as we have charged in the indictments" (App. 324).
> "And they devised a plan and a method to deliver that rejected powder anyway and to collect for it" (App. 327).
> "That is the first inkling of the conspiracy" (App. 328).
> "What further evidence do we have that a conspiracy existed?" (App. 329).
> "Now, in further consideration of whether a conspiracy existed, let's look at the activities here at Walton?" (App. 336).
> "into this conspiracy" (App. 340).
> "It was done in order and changes were made in that they could deliver these rejected lots and make

> a claim to the Government of the United States for them and get paid" (App. 350).

Elsewhere in his summation, the prosecutor hedged.

> "I think we have demonstrated sufficiently to you that there was in fact a conspiracy both to substitute rejected powder for accepted powder and a conspiracy to file false claims" (App. 338).

But the confusion as to the prosecution's theory of the case is not limited to the instances already given. In many places the prosecution offered evidence "solely in connection with the indictment under 83 and not as against Mr. Ebbighausen and Mr. Atlas" (App. 140, 143, 144, 146, 147, 152). The meaning of this offer is totally obscure. If the evidence was offered only under the Section 83 indictment, then there was no reason specifically to mention petitioners Ebbighausen and Atlas. It would not be admissible as to them, since they had already been acquitted of the Section 88 charge, but neither would it be admissible as against any of the other defendants under the Section 88 indictment. The exclusion of Ebbighausen and Atlas in the prosecutor's statements constituted a negative pregnant, which left open the inference that the evidence was usable as against the other four defendants under both the Section 83 and the Section 88 indictments. Indeed, the Government, in certain instances, explicitly introduced some evidence as against all the petitioners except Ebbighausen and Atlas, on the theory that all evidence as against Charles Cohen, Julius Cohen, Samuel Dunkel & Co. and Sondra Egg Products Corporation, whether presented under the Section 83 or the Section 88 indictment, could be used under either (App. 148, 161, 168-169, 172, 318; cf. App. 154). Thus, specifically, certain evidence, admittedly not within the scope of the Section 88 indictment, was nevertheless apparently admitted as to all the petitioners,

except Ebbighausen and Atlas, under both the Section 83 and Section 88 indictments (App. 168-169). Indeed, in the Court of Appeals the United States expressly took the position that as to the two corporations and the petitioners Cohen "all of the evidence relating to either charge was admissible against them in one way or another" (Brief, p. 24).

It may be wondered whether any segregation of evidence as between these two indictments could have been made so as to protect the defendants' interests. A major vice of the trial lay in the consolidation of two separate supposedly independent conspiracies and the subsequent attempt of the United States to prove that they were not two or separate or independent.

Even the trial judge admitted that he could not recall the segregation of the evidence under the two indictments. "* * * perhaps other evidence which has escaped my memory was offered only in connection with the 83 indictment" (App. 379).

II.

The error of the charge and the violation of the Braverman rule.

By the time this trial had come to its end, the harm was already done. The prosecution, with its "probably—yes—but—possibly—no" theory of one conspiracy had so prejudiced the defendants by swerving from the terms of the indictments that no charge, however perfectly wrought, could have undone the harm.

But the effect of a correct charge is a hypothetical issue. For this charge was not correct. Although implicit throughout the entire case and explicit in many of the colloquies was the question whether one or two conspiracies[5]

5. We put aside, for purposes of argument the possibility that seven conspiracies may have been charged.

had been charged and/or proved, the Court never informed the jury of their right to make a determination of this issue. He told them that they might consider "whether or not two separate conspiracies existed as claimed in the indictment" (App. 359), but he never informed them of their power to find one conspiracy. Elsewhere his charge was clearly susceptible of the interpretation that either two conspiracies or none existed:[6]

> "Unless you find in your consideration of these two charges that actual unlawful agreements existed to which the defendants were knowingly parties, and that some overt act looking to the consummation of the purpose of each conspiracy was committed or performed, by one of the parties thereto, then, of course, there can be no conviction of either of these two charges" (App. 361).

The Government in the Court of Appeals clearly recognized that the District Judge did not leave it open to the jury to decide whether there was one or two conspiracies. Its brief stated, "It was not necessary for the jury to determine whether there was one conspiracy or two conspiracies * * * but only to determine if the defendants had conspired as charged in each indictment" (Brief, p. 20). It relied in defense of this omission on a holding in *Montrose Lumber Co.* v. *United States,* 124 F. 2d 573, 575 (C. C. A. 10, 1941) that a single conspiracy can be divided up into different parts, each separately indictable and punishable.

The *Montrose* case, if it so holds, and the Government's position in the Court of Appeals are, however, wrong and flatly in conflict with *Braverman* v. *United States,* 317 U. S. 49, as well as with decisions in other Circuits such as

6. This is the precise converse to the situation presented in *Kotteakos* v. *United States,* 328 U. S. 750, 767, where the Court charged that the jury could find only one conspiracy, although the proof clearly showed several.

Maxfield v. *United States*, 152 F. 2d 593, 595 (C. C. A. 9, 1945) and *Youst* v. *United States*, 151 F. 2d 666, 667 (C. C. A. 5, 1945). The unique quality of a conspiracy charge is that it may not be fragmented into separate little conspiracies. "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." *Braverman* v. *United States*, 317 U. S. 49, 53.

In short, the petitioners may not be charged in two indictments for a single conspiracy, nor *a fortiori* may they be sentenced on two indictments.

It is not amiss to point out the practical consequences of the failure of the charge to allow the jury to decide whether there was one or two conspiracies. Given this choice, the jury might have—and in view of the evidence and the prosecutor's theory of the case we believe would have—determined that if the petitioners were guilty at all, their guilt lay in the fact of a single conspiracy. We cannot know whether, taking that view, the jury would have decided that the conspiracy in question was that alleged under the Section 88 indictment or the Section 83 indictment.

Had it chosen the former, petitioner Samuel Dunkel & Co., Inc. could not have been fined $10,000 on the second indictment; petitioner Sondra Egg Products Corporation could not have been fined $5,000 on the second indictment; petitioner Charles Cohen could not have been sentenced to two years on the second indictment (this sentence ran concurrently with a two year sentence on the first indictment) nor could he have been fined $4,000 on the second indictment; petitioner Julius Cohen could not have been sentenced to three years on the second indictment (a two year sentence on the first indictment ran concurrently with this sentence), nor could he have been fined $2,000 on the second indictment.

Had the jury determined that the only conspiracy was that alleged under the Section 83 indictment, the following consequences would have ensued: Petitioner Carl Ebbighausen would have had to be acquitted, since he was tried only under the Section 88 indictment; petitioner Sidney Atlas would also have had to be acquitted, since he too was tried only under the Section 88 indictment; petitioner Samuel Dunkel & Co. could not have been fined $10,000 under the first indictment; petitioner Sondra Egg Products Corp. could not have been fined $5,000 under the first indictment; petitioner Charles Cohen could not have been sentenced to two years on the fisst indictment nor fined $1,000 under that indictment; petitioner Julius Cohen could not have been sentenced to three years on the first indictment nor fined $1,000 thereunder.

The multiple sentencing of the petitioners under the two indictments was precisely what the *Braverman* case sought to avoid.

III.

There Was Only One Conspiracy.

In the last section of this brief, we have assumed that the jury could properly have determined that there were two conspiracies. This is an overly generous view. Actually there was no proof of separate agreements. It is true that, as the indictments were framed, evidence required to prove the Section 83 indictment was not needed to prove the Section 88 indictment. Thus, to prove that the petitioners had deceived the Government into accepting egg powder that had previously been rejected did not require proof of false affidavits. But merely because more evidence than that needed to prove the Section 88 charge was needed to prove the Section 83 charges does not mean that two separate agreements existed. If a man is charged

with a conspiracy to assault and also with a conspiracy to murder, obviously more will be needed to prove the conspiracy to murder than the conspiracy to assault. Yet if the alleged conspiracies were in fact but one and the assault was merely a preliminary to the murder, he cannot be convicted of two conspiracies, though the proof be different. That is precisely the case at bar. The alleged conspiracy to deliver rejected egg powder to the Federal Surplus Commodities Corporation cannot be separated from the false affidavits and vouchers that the defendants allegedly made out to secure payment for the rejected power. Obviously, if the defendants wanted anything, it was to be paid for egg powder they delivered. If they deceived the Government, their reasons were not gratuitous. Whatever the defendants may have done by way of delivering rejected powder or powder from the Government's own stocks was done, if at all, pursuant to a plan to get paid for what they should not have been paid. It cannot be said—and indeed at the trial it was not said—that one plan, scheme, or conspiracy was to make false deliveries and another plan, scheme, or conspiracy was to present affidavits in support of their false claims based on these deliveries.[7] The Government itself put in succinct form the identity of the transactions:

> "* * * both charges arose either out of the same series of transactions, as in the case of filing false claims for rejected powder, or were connected together, as in the case of affidavits falsifying the age of rejected powder as well as other powder that may not have been rejected, and as in the case of powder diverted from Government stock and combined with

7. Although in each instance the claims were alleged to be false for several reasons, in each instance one of the reasons was that the powder delivered "because such egg powder had not been sampled by the United States * * * and because no grading certificate relating to such powder was attached to said voucher" (Ex. 25, 28, 30, 32, 35, 37).

rejected powder into lot 124. * * * " (Court of Appeals Brief, p. 23).[8]

Since the two conspiracies alleged were in fact but one, either the trial judge should have dismissed one of the indictments or should have charged the jury that it might find the defendants guilty on one, but not on both, indictments.

IV.

Indictment No. 29098 Charged Six Conspiracies.

The Section 83 indictment, which is seventy-three pages in length as printed in the Joint Appendix, is at best "so turgid as to be almost incomprehensible". Biggs, *J.*, concurring in *United States* v. *Lembo,* 184 F. 2d 411, 415 (C. C. A. 3, 1950). Although, on the one hand, it charges initially that the defendants conspired "to defraud the United States of America by obtaining the payment of certain false claims, hereinafter described, all in the manner and by the means hereinafter alleged" (App. 19), each of the paragraphs in connection with the six false claims contains statutory charging language, thereby indicating that the jury considered that in each instance there had been a separate agreement.

The United States in its brief in the Court of Appeals called the use of the charging language in connection with each false claim an "excess of caution" (p. 19) on the part of the grand jury, but if so it was the excess of caution that confusion sometimes produces. Not certain

8. Elsewhere in its brief (p. 21) the United States said, "So here, if it should be determined that there was only one general agreement, a determination wholly unnecessary to the issues of the case, it is patent that that part of the agreement to circumvent the processes of the Department of Agriculture and deliver rejected powder was a conspiracy in violation of Section 88, and that part of the agreement to obtain money from the United States by filing false claims was a conspiracy in violation of Section 83."

whether as a matter of law one or six conspiracies should be charged, the grand jury chose the deceiving "out" of charging both one and six.

If there be any further doubt that the indictment in large part proceeds on a six conspiracy theory, it is resolved by examination of the manner in which the grand jury specified each false claim transaction. In every instance, the manner in which the defendants conspired to present false claims is specified in detail by subparagraphs (App. 23-26, 26-28, 28-30, 30-33, 33-36, 36-38), precisely the way the mechanics of six separate conspiracies would be charged.

Of course, the prosecutor did not attempt to prove six conspiracies; indeed, as has been pointed out, he did not even believe or attempt to prove that the indictment charged one independent conspiracy. But the defendants, at their two trials, were obviously under the burden of preparing their cases so as to meet the claim of seven conspiracies (one under the Section 88 indictment and six under the Section 83 indictment) if that claim were made. This burden, added to the confusions of the trial and sentencing, was a final and supererogatory unfairness.

CONCLUSION.

The petition for certiorari should be granted and the judgment affirming the conviction of petitioners reversed.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 440

SAMUEL DUNKEL & CO., INC., SONDRA EGG PRODUCTS CORP., CHARLES COHEN, JULIUS COHEN, CARL EBBIGHAUSEN AND SIDNEY ATLAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (App. 409-413) [1] is reported at 184 F. 2d 894.

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[1] The designations "App." and "R." apply, respectively, to the Joint Appendix printed in the court below and the typewritten transcript of the record on appeal certified to this Court by the Clerk of the Court of Appeals.

JURISDICTION

The judgments of the Court of Appeals were entered on October 31, 1950 (App. 414-415). On November 10, 1950, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Jackson to December 30, 1950 (App. 416), and the petition was filed on December 7, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, separate sentences could lawfully be imposed upon petitioners upon their conviction on separate indictments charging, respectively, a conspiracy under the general conspiracy statute to defraud the United States by delivering rejected egg powder, and a conspiracy to defraud the United States by obtaining payment of false claims for egg powder not manufactured within thirty days.

2. Whether, under the indictment charging a conspiracy to defraud the United States by obtaining payment of six false claims, the proof actually established six separate conspiracies, in violation of the rule of *Kotteakos* v. *United States,* 328 U.S. 750.

STATUTES INVOLVED

Section 35(A) of the Criminal Code, 18 U.S.C. (1946 ed.) 83, provided, as of the dates involved in this case:

Whoever shall enter into any agreement,

> combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Section 37 of the Criminal Code, 18 U.S.C. (1946 ed.) 88, provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

In two indictments filed in the District Court for the Northern District of New York on April 30, 1943 (App. 1), petitioners were charged, respectively, with a conspiracy to defraud the United States, in violation of Section 37 of the Criminal Code (Indictment No. 29,097), and a conspiracy to defraud the United States by obtaining payment of false claims, in violation of Section 35(A) of the Criminal Code (Indictment No. 29,098). The cases were consolidated for trial. All of the petitioners were tried under the Section 37 indictment, and

Samuel Dunkel & Co., Inc., Sondra Egg Products Corp., Charles Cohen, and Julius Cohen were tried under the Section 35(A) indictment.[2] The jury found petitioners guilty as charged and tried and they were sentenced as follows: Samuel Dunkel & Co., $10,000 fine on each indictment; Sondra Egg Products Corp., $5,000 fine on each; Charles Cohen, two years' imprisonment on each, to run concurrently, and $1,000 fine on the Section 37 indictment, and $4,000 fine on the other; Julius Cohen, two years' imprisonment on the Section 37 indictment and three years on the other, to run concurrently, and $1,000 fine on the first and $2,000 on the second; Ebbighausen and Atlas, imprisonment for a year and a day and fine of $1,000 on the Section 37 indictment (App. 396-408).

Upon appeal to the Court of Appeals for the Second Circuit, the convictions were affirmed (App. 414-415).

Indictment No. 29,097 (App. 4-17) charged that petitioners and one Jacob Ferber, during the period from August 1, 1941, to November 1, 1942, conspired to defraud the United States of approximately $650,000 and that certain acts were done by

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[2] In an earlier trial, petitioners were convicted on both indictments, except that Ebbighausen and Atlas were acquitted on the Section 35(A) indictment. The judgments of conviction were reversed in *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (C.A. 2), because the jury, upon reporting disagreement and reporting the proportion of the majority and minority vote, was given a supplemental charge, in violation of the rule in *Brasfield* v. *United States*, 272 U.S. 448.

parties to the conspiracy to effect its object. It was alleged that during the period of the conspiracy Samuel Dunkel & Co., Inc., entered into a series of contracts with the Federal Surplus Commodities Corporation, an agency of the United States, under which Samuel Dunkel & Co., Inc., agreed to sell approximately 7,000,000 pounds of dried whole egg powder, having a value of $1 or more per pound;[3] that Sondra Egg Products Corp., an affiliate of Samuel Dunkel & Co., Inc., manufactured egg powder at a factory at Walton, New York, which powder was sold by Samuel Dunkel & Co., Inc., to the United States (App. 6); that during the above period, Charles Cohen was an employee of Samuel Dunkel & Co., Inc., and Sondra Egg Products Corp. and participated in the management and control of both corporations, Julius Cohen was Secretary and Treasurer of both corporations and had supervisory control of the business and employees, Ebbighausen was manager of the dried egg business of both corporations, and Atlas was manager of the Walton factory (App. 6-7); that approximately 650,000 pounds of egg powder were rejected during the above period as not complying with the terms of the contracts, and that it was the plan of the conspirators to represent that the rejected egg powder had been tested and found to comply (App. 8-9); that tests of egg powder were to be arranged at Walton in

[3] The first contract of the series was accepted on August 7, 1941, and the last on September 3, 1942 (App. 15-17).

which government inspectors would be furnished particular lots of egg powder that did in fact comply with the contracts and these lots were to be resubmitted over and over for this purpose (App. 9, 11); that the resulting grading certificates were to be used for rejected lots of egg powder, the markings on the barrels of rejected lots to be changed to accord with the certificates (App. 9-10); and that the rejected lots were to be delivered to the United States and claims made for payment upon the basis of false vouchers, affidavits, and grading certificates obtained on other lots of egg powder complying with the contracts (App. 9-11).

The overt acts charged in the indictment were of two groups: (1) the acts of Atlas on or about July 13, 28, and 29, 1942, respectively, in arranging for government inspection of egg powder complying with the contracts, thereby obtaining issuance of grading certificates Nos. DE 4313 and DE 4584 (App. 11-12), and (2) the acts of defendants in making three deliveries of rejected egg powder to the United States, two, each in the amount of 30,000 pounds on August 1, 1942, and one in the amount of at least 3,200 pounds on August 25, 1942 (App. 12-13).

The second indictment, No. 29,098 (App. 18-91), charged that during the period from May 1, 1942, to November 1, 1942 (App. 18-19), petitioners and Ferber conspired with each other and with Irving

Dunkel, William Cohen, and Jerry Cohen[4] to defraud the United States by obtaining payment of certain false claims, in violation of Section 35(A) of the Criminal Code; that, on or about April 3, May 7, and July 9, 1942, respectively, Samuel Dunkel & Co., Inc., entered into contracts Nos. FSC 21805, 23353, and 25909 with the United States for the sale of egg powder (App. 22);[5] that each of the three contracts provided, *inter alia*, that none of the egg powder should be manufactured more than 30 days prior to the delivery date, and that upon presentation of a voucher for payment there should be presented with the voucher a certificate of accuracy, grading certificate, and an affidavit that the powder had been manufactured not more than 30 days prior to the date of delivery (App. 22-23); that, as part of the conspiracy, petitioners conspired to defraud the United States by presenting six vouchers to the Government during the period from July 9, 1942, to September 30, 1942, claiming payments for deliveries of egg powder in the aggregate sum of $196,769.75, accompanied in each case by a grading certificate purportedly relating to the egg powder for which payment was claimed, and an affidavit of Julius Cohen that the powder had been manufactured no earlier than 30 days prior to the con-

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[4] Only petitioners and Ferber were indicted; the rest were named as co-conspirators but not indicted (App. 19).

[5] These contracts were included among the contracts referred to in the Section 37 indictment (App. 16).

tracted delivery date;[6] that in each case (excepting possibly 20 barrels hereinafter discussed), the egg powder had actually been dried more than 30 days prior to the contracted delivery date and in no case had the grading certificates been obtained by tests of the egg powder for which payment was being claimed (App. 24-25, 27-28, 29-32, 34-35, 37); that 20 barrels of powder for which payment was so claimed was the property of the United States, having theretofore been entrusted to Samuel Dunkel & Co., Inc., for repackaging (App. 32-33); that at least 59,400 pounds of the egg powder for which payment was so claimed consisted of powder offered by Samuel Dunkel & Co., Inc., for sampling under previous contracts and rejected by the United States as failing to comply with the contracts (App. 25, 27, 32);[7] that petitioners knew that the

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[6] Date (1942)	Voucher No. BU:	Amount	Grading Cert. No. DE:	Contract No. FSC:	
July 9.....	23703	$10,100	3820	23353	(App. 36)
Aug. 1.....	26134	30,750	4313	25909	(App. 24)
Aug. 1.....	26135	30,750	4313	25909	(App. 26)
Aug. 1.....	26136	30,750	4313	25909	(App. 29)
Aug. 25.....	28545	62,400	4584	21805	(App. 31)
Sept. 30.....	32131	32,019.75	4949	23353	(App. 34)

The tabular form is here employed in the interest of brevity. It was not employed in the indictment; a separate series of paragraphs was used with respect to each voucher, and each series of paragraphs was preceded by the formal charge that the subsequent allegations in respect of the voucher described a "part of the conspiracy" to defraud (App. 24-38).

[7] These deliveries of rejected egg powder also constituted the three overt acts of delivery charged in the Section 37 indictment, although one of the deliveries stated to have been in the amount of "at least" 26,200 pounds of rejected powder in the Section 35(A) indictment (App. 27), is stated to have been "approximately" 30,000 pounds in the former indictment

vouchers and affidavits were false; and that petitioners obtained payment under the vouchers (App. 25, 28, 30, 33, 35-36, 37-38). The overt acts alleged were that Atlas, on or about June 22, July 13, 28 and 29, and August 17 and 18, 1942, arranged for government inspection of egg powder complying with the contracts and obtained issuance of grading certificates Nos. DE 3820, 4313, 4584, and 4949.[8]

The evidence adduced at the trial included a voluminous array of documents tracing the course of various lots of egg powder through the various falsifications of records, changes of markings on barrels, and eventually to the submission of claims, inspection certificates and affidavits to the Government. Extensive testimony of employees of petitioners, and of warehousemen, truckers, government inspectors, and investigators, not only traced the course of various lots through the channels by which the frauds were perpetrated, but also linked the petitioners to the respective acts for which they were on trial. It is impossible within

(App. 13). The figure of 30,000 pounds seems correct since the voucher involved (BU 26135) covered a purported warehouse lot No. 15167 (App. 26-28; 76) which was actually a manufacturer's lot No. 55 under contract No. FSC 19,948 (R. 1337, 1338-1339, 1341-1344, 1540-1544), which lot had been rejected in the entire amount of 30,000 pounds (App. 392). And other lots under the Section 35(A) indictment were shown to have been rejected, in addition to the lots as to which the indictment so charged. See R. 636-637, 642; Ex. 51, 74E, 75; App. 392.

[8] The obtaining of certificates numbered DE 4313 and 4584 were charged as overt acts in the Section 37 indictment (App. 11-12).

the limits of a brief in opposition to attempt to correlate the charges with each of the supporting details placed in evidence, but the following summary of certain portions of the evidence illustrates how petitioners operated.

The first contract of Samuel Dunkel & Co., Inc., to sell egg powder to the Government was accepted on August 7, 1941 (App. 15). It is not clear on what date petitioners first became aware that their product would not comply with the contract standards, but as early as December 1941 or January of 1942 Julius Cohen, Ebbighausen, and Ferber met and worked on the substitution of records of accepted lots of powder for rejected lots (R. 525-528). In the month of March 1942 alone, rejections had swelled to an aggregate amount of over $175,000 (App. 392). As early as March 15, under the supervision of Atlas, a "special run" of egg powder was put through the Walton plant "for sampling purposes," employing strictly fresh eggs and with special care that the product be of good quality (App. 126-127; R. 2442, 2444). The barrels containing this run were stored on the first floor of the plant and were numbered to represent that they were samples of various lots stored elsewhere and brought there for the convenience of the inspector (R. 1192-1195). It was from these barrels that the inspector would take his samples (R. 1088).[9]

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[9] After such a sampling, the numbers and symbols would be scraped off and replaced with others purporting to represent later lots. The inspector would thus be sampling the same barrels over and over again (R. 1195-1195A).

Also at about this time, a second method of deception was employed. A can of egg powder from the special run was kept at the New York office of Samuel Dunkel & Co., Inc., and on some occasions when inspectors left their sample packages at the office, the contents would be replaced with the special powder, thereby obtaining grading certificates of acceptance having no relation to the lots they purported to represent (App. 110-114).

On April 1, 1942, a contract procured by Samuel Dunkel & Co., Inc., embodied a new requirement that egg powder be produced no earlier than thirty days before the contracted delivery date, the requirement being applied to powder to be delivered on and after July 1 (App. 87-88). Pursuant to an announcement of the Department of Agriculture on April 14, 1942, this requirement became a part of all subsequent contracts (App. 50, 55-56), thereby applying to petitioners' deliveries commencing June 16 (App. 16).

In order to illustrate the transactions of petitioners as well as the type of evidence adduced at the trial to prove these transactions, the following detailed facts are presented with respect to a sale to the Government of egg powder that was both rejected and over-age:

On March 31 and April 1, 1942, 96 barrels and 54 barrels, respectively, were delivered to the Merchants Warehouse and stored for the account of Samuel Dunkel & Co., Inc. They were given warehouse lot No. 35,436 (Ex. 95A, 95B). This number

was stamped on each of the barrels, together with the date of arrival (R. 1528, Ex. 107-A). The barrels were stenciled with various symbols showing that the powder was produced at West New York, New Jersey, in March 1942, under contract No. 19948. Each bore the manufacturing lot number 57 (R. 719, 720, Ex. 56). The lot was sampled by an inspector on April 3, 1942 (R. 719-723). The United States Department of Agriculture number was not applied since these numbers had not yet come into use. On April 14, 1942, the lot was rejected by the Agricultural Marketing Administration (Ex. 27-I). Grading certificate No. 2072 was forwarded to the Dunkel company setting forth the rejection (Ex. 28-L). On April 29, 1942, the lot was ordered out of Merchants Warehouse by Jacob Ferber (Ex. 49) and on April 30 was transported to the Hall Street warehouse (Ex. 95D, 106, R. 1677), where it was given warehouse lot No. 13,347 (Ex. 72B). On July 13, 1942, at the Walton plant, an inspector inspected a lot which complied with the contract standards, designated as manufacturing lot No. 114 under contract No. 25,909 (Ex. 61) and impressed it with the United States Department of Agriculture number 440. On July 17, 1942, Hall Street lot No. 13,347 (Mfg. Lot No. 57) was ordered out of the warehouse by Ebbighausen (Ex. 69) and on the same day a receipt was issued purporting to show the arrival of a lot designated as warehouse lot No. 15,168 (Ex. 72A). But the barrels in lot No.

13,347 did not actually move out of the warehouse. The in ticket No. 15,168, showed on its face that it was to replace lot No. 13,347. The out ticket and the new in ticket were fictions to clear the warehouse records (R. 1352, 1353). The numbers, symbols and dates on this rejected lot No. 57 were scraped off and replaced with Walton data by means of a stencil supplied by the Dunkel company. Mfg. lot No. 57 was changed to Mfg. Lot No. 114 and the contract number was changed from 19,948 to 25,909, the place of manufacture was changed from West New York to Walton, and the date of manufacture was changed from March to July. The warehouse lot No. 13,347 was replaced with warehouse lot No. 15,168 (Ex. 107A, R. 1353, 1725-1730). Claim for payment was made on August 1, 1942. The voucher was signed by Jacob Ferber and the 30-day affidavit by Julius Cohen. In both documents it was represented that the lot (warehouse No. 15,168 and Mfg. Lot No. 114) was produced at Walton and in the supporting affidavit by Julius Cohen the drying date was given as July 10 and 11, 1942 (Ex. 34). The claim was paid on August 4, 1942, by a Treasury check (Ex. 33).

ARGUMENT

1. Petitioners' basic contention is that the transactions charged in the two indictments constituted only a single conspiracy and that this conspiracy could not be punished by separate sentences under both Section 35(A) and 37 of the Criminal Code

(Pet. 7, 8, 11-13). The contention is unsound on the facts, for there was a conspiracy to defraud the United States by delivering rejected egg powder long before there was any occasion for concocting the conspiracy with respect to over-age powder. Only the deliveries on and after June 16, 1942, were covered by the new requirement that egg powder be manufactured within 30 days before the contracted delivery date. While it is clear from the proof that petitioners conspired from the outset to deliver rejected egg powder by falsifications as to its quality, accomplished by using false grading certificates, this conspiracy could not be considered a conspiracy to defraud the United States by presenting false claims for the over-age powder involved in the Section 35 (A) indictment and as to which affidavits were not required until after the inception of the earlier conspiracy. The decision to commit the latter offenses could not have been planned before April 1, 1942, the date of the first contract embodying the new provision, and it could actually have been deferred until shortly before June 16.

While egg powder that was both rejected and over-age could have been the subject of an overlapping of the conspiracy charged in the Section 37 indictment and the conspiracy charged in the Section 35(A) indictment, it could scarcely be said that the latter conspiracy, concerned with over-age powder, could encompass rejected powder delivered before the over-age ban went into effect, or

that the former conspiracy, originated to deal with rejected powder, contemplated the later arrangements necessitated by the change in the requirements.

Neither is petitioners' contention sound as a matter of law, even upon their hypothesis that there was but one general conspiracy. For such a conspiracy would have been an offense in its design to deliver sub-standard egg powder to the Government (under Section 37) and also an offense in its design for yet another, different type of damage to the Government, that is, the obtaining of payment under false claims (Section 35(A)). The damage to the Government from the first offense (independently of the collection of the price, as a further offense) could possibly have been less, in dollars, than the actual purchase price of the defective powder, but it could, on the other hand, have been much more, in terms of re-shipment costs and circumvention of the governmental inspection procedure. There were, accordingly, sound reasons for separate statutes and separate indictments addressed, respectively, to the punishment of the planning of earlier steps of the transaction, as well as to the punishment of plans for the ultimate profit-taking.[10]

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[10] Petitioners place emphasis on the fact that the Section 37 indictment included the statement that the conspiracy contemplated ultimate collection of a false claim from the Government (Pet. 6, 15). This further offense could not eliminate the offense completed by the planning of the earlier steps, and the overt acts thereunder.

It has long been established that one transaction may violate a number of statutes and be punishable separately under each statute violated. As stated in *Albrecht* v. *United States*, 273 U. S. 1, 11:

> There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.

See also *Blockburger* v. *United States*, 284 U. S. 299, 304; *Morgan* v. *Devine*, 237 U. S. 632, 641; *Gavieres* v. *United States*, 220 U. S. 338, 341-344; *Carter* v. *McClaughry*, 183 U. S. 365, 394-395; *United States* v. *Shapiro*, 103 F. 2d 775, 777 (C.A. 2).

The principle applies as well to conspiracies as to substantive offenses. See *American Tobacco Co.* v. *United States*, 328 U. S. 781, 787-788; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226 n.; *Montrose Lumber Co.* v. *United States*, 124 F. 2d 573, 575-576 (C.A. 10); *United States* v. *Shapiro*, 103 F. 2d 775, 776 (C.A. 2); *United States* v. *Buchalter*, 88 F. 2d 625, 628 (C.A. 2), certiorari denied, *sub nom. Shapiro* v. *United States*, 301 U. S. 708. In the analagous situation involved in the *American Tobacco* case, *supra*, this Court said in rejecting similar contentions (328 U. S. at 788):

> Petitioners seek support for these contentions as to the two conspiracy counts from the

principles stated in *Braverman* v. *United States,* 317 U. S. 49, and in *Blockburger* v. *United States,* 284 U. S. 299. On the authority of the *Braverman* case, petitioners claim that there is but one conspiracy, namely, a conspiracy to fix prices. In contrast to the single conspiracy described in that case in separate counts, *all charged under the general conspiracy statute, § 37, Criminal Code, 35 Stat. 1096, 18 U.S.C. § 88, we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act.* [Italics supplied.]

Petitioners cite certain language from *Braverman* v. *United States,* 317 U. S. 49, 53, but in that case it was sought to impose several sentences under only one statute. While the several substantive crimes committed under the conspiracy in the *Braverman* case might have been the subject of several sentences under other statutes, the conspiracy itself, being charged as a violation of only one statute, was subject to only one sentence. It is to be noted that the opinion itself points out that the situation there involved "differs from successive acts which violate a single penal statute and from a single act which violates two statutes" (p. 54), citing *Blockburger* v. *United States, supra,* 284

U. S. 299, 301-4, and *Albrecht* v. *United States*, *supra*, 273 U. S. 1, 11-12.[11]

2. Petitioners claim that they were subjected to confusion by the language of the Section 35(A) indictment, in that the indictment charged six separate conspiracies (Pet. 7, 16-17). We think that the language itself is a clear answer to this contention. The indictment, after charging a conspiracy to defraud the United States by obtaining payment of false claims, alleged six instances of such pay-

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[11] The foregoing considerations also dispose of petitioners' objection that the court's charge to the jury excluded a possible finding that only one conspiracy existed (Pet. 11-13). We do not think that the language quoted by petitioners (Pet. 12) was to that effect, particularly within the context of the entire series of charges. For language contrary to the result alleged by petitioners, see e.g., "It is the conspiracy or agreement looking to the commission of these acts [defrauding the United States and presenting false vouchers], the existence of which you must determine by your verdict" (App. 378); "conspiracy or conspiracies" (App. 377).

Petitioners' further contention, which they seek to support by isolated excerpts from government counsel's remarks, that there was confusion at the trial as to the Government's position as to whether one or two conspiracies existed (Pet. 7-11), is refuted (1) when those remarks are read in context, (2) by the very fact that much evidence was limited to the Section 35(A) indictment (see Pet. 10-11), and (3), conclusively, by the trial court's explicit instruction (App. 359-360) that—

"It is a question of fact for your decision whether or not two separate conspiracies existed as alleged in the indictments. You will notice that it is claimed they continued for different periods of time, and I am sure that you will appreciate that the establishment of the two conspiracies requires different proof in one than in the other. The fact that the agreements in some respects may overlap both in time and in the proof is not determinative of the question. If the common understanding or purpose of the agreements were different, if the object to be accomplished were separate and distinct, then the existence of the separate conspiracies may be found."

ments. Each instance was set forth in a series of paragraphs describing the details, and each series of paragraphs was begun with substantially the following language, varying only in the amount involved and in the contract number:

> As part of [or, As a further part of] the conspiracy alleged herein, defendants, during the period and at the place aforesaid, wilfully, unlawfully, fraudulently, and feloniously conspired and agreed among themselves to defraud the United States by obtaining payment [of a particular claim].

While there may have been some redundancy in employing the full statutory language in connection with the false claims, it is clear that the indictment did not purport to charge numerous conspiracies. For the language of the indictment charged only a single conspiracy and the respective paragraphs relied upon by petitioners in each case show on their face that the details set forth constitute only a "part" or "further part" of "the conspiracy."

Petitioners' contention is not only without merit upon the language of the indictment; it is as clearly invalid upon the proof. In *Kotteakos* v. *United States,* 328 U.S. 750, upon which they rely, multiple conspiracies, each of which involved a broker as a central figure, were charged as a single conspiracy. The individual defendants who dealt with the broker had no connection with each other, but the

evidence of their individual dealings with the broker was admitted against the others. The holding was that in such circumstances the possible prejudice in attributing the acts of these individuals to one another could not be disregarded as harmless error. That decision is wholly inapposite here. For the indictment under Section 35(A) charged and the proof under it showed a single, integrated conspiracy to make and collect false claims for over-age egg powder. Charles Cohen and his son Julius Cohen were the officers and active heads of the Dunkel corporation, which filed and received payment on all of the fraudulent claims under this indictment. They were likewise the officers and active heads of the Dunkel corporation's affiliate, Sondra Egg Products Corp., which fraudulently obtained good grading certificates for use in obtaining payment of the claims. Unlike the situations involved in the *Kotteakos* case, the particular false claims alleged in the indictment were but particular manifestations of the conspiracy in operation, i.e., particular instances in which the continuing conspiracy was effectuated.

CONCLUSION

The decision below is correct and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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